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IN THE

Supreme Court of the United States

October Term, 1969
No. 1454

H. R. JOHNSON and JOHN B. JOHNSON,
Petitioners,

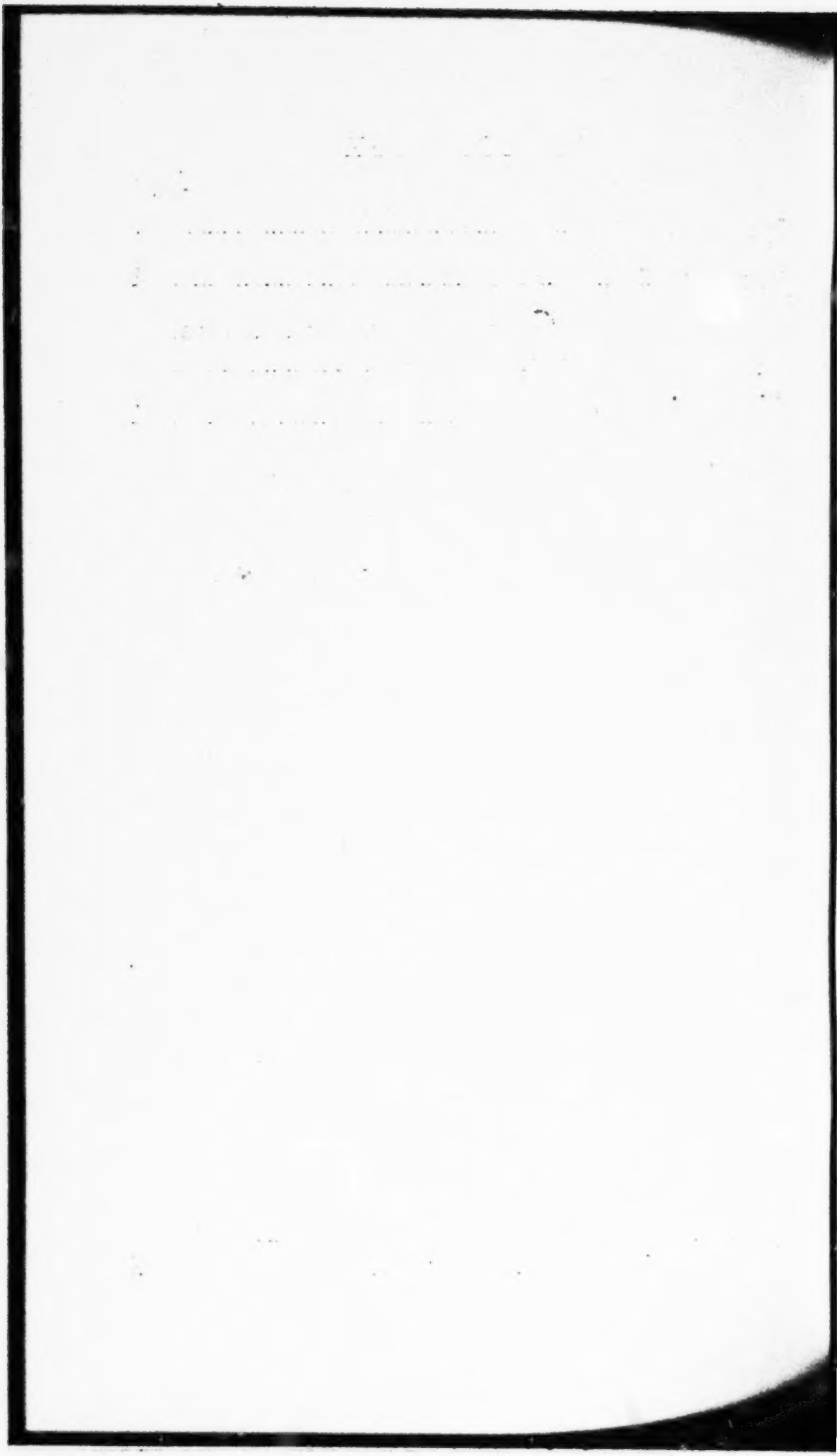
vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

Page

Opinion Below 1

Jurisdiction 1

Constitutional Provisions, Statutes and Federal Rules and Regulations Involved 2

Questions Presented 2

Statement 3

Summary Judgment 5

Reversal 5

Reasons for Granting the Writ 6

I.

Subsequent Action Does Not Exclude Application of Res Judicata 6

II.

Justice v. United States, 9th Circuit (1944), 145 F. 2d 110, Relied Upon by the United States Court of Appeals as Its Authority in Reversing the District Court Is Not in Point With the Facts of This Case 7

III.

The Respondent Herein, the United States, Is Bound by Its Allegations in Its Complaint and in Its Motion for Order of Continuing Possession, Both of Which Were Filed June 30, 1965. It Is Also Bound by the Judgment of the District Court of July 12, 1965, That Possession Is Continuous 8

IV. Page

The Methods Used by the United States in Connection With Condemnation Matters Has Become High Handed and Oppressive and Should Be Approved Only When the Fairness Thereof Is Adequately Established. This Is Not Such a Case 9

Conclusion 10

Index to Appendices

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit 1

Appendix B. Motion for Order of Continuing Possession, Affidavit and Points and Authorities in Support Thereof 5

Appendix C. Order Continuing Right to Possession in Condemnation 7

Appendix D. Judgment 9

TABLE OF AUTHORITIES CITED

Cases	Page
Justice v. United States, 9th Circuit, 145 F. 2d 110	7
Love v. Waltz, 7 Cal. 250	6
Williams v. Hawkings, 34 Cal. App. 146, 166 Pac. 869	6

Statutes	
Public Law, pp. 88-446	2
25 Statutes at Large, p. 357	2
62 Statutes at Large, p. 986	2
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 40, Sec. 257	2

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H. R. JOHNSON and JOHN B. JOHNSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, above named, hereby petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit, dated January 28, 1970, and the Order of said Court dated March 10, 1970, denying petition for Rehearing by said Court.

Opinion Below.

The Judgment of the United States Court of Appeals for the Ninth Circuit was made and entered January 28, 1970, a copy thereof, is appended to this Petition as Appendix A hereof.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Under date of April 10, 1970, The United States Court of Appeals issued an Order Staying Issuance of Judgment pending the filing, consideration and disposition by the Supreme Court of the United States of a Petition for Writ of Certiorari to be made by appellees herein, provides such Petition is filed in the Clerk's Office of the Supreme Court of the United States on or before April 27, 1970.

Constitutional Provisions, Statutes and Federal Rules and Regulations Involved.

The basis for federal jurisdiction in the United States District Court is in the Act of Congress approved August 19, 1964 (Public Law 88-446), and this action is brought under the authority of the Act of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 257), as amended June 25, 1948 (62 Stat. 986).

Questions Presented.

1. Does the rule of *res judicata* apply in a case for condemnation of the use of the surface of land where the parties are the same; the land involved is the same; the questions involved are the same; and there has been no change of circumstances; where there have been two prior complaints for such condemnation, the first one resulting in a verdict by a jury and judgment thereon for the annual rental of $2,700.00? The second complaint resulted in a judgment stipulated to by the United States *continuing* the Rental for $2,700.00 per year, and where in connection with the third complaint for condemnation for said use, the United States specifically alleges, and the Order thereon finds, that there was a continuing possession since 1943 and orders that the possession should continue.

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2. The question here involved is one of great general interest because the rule of *res judicata* is a fundamental rule of law and should be applied uniformly where the parties are the same, the land is the same, and the questions are the same, and there has been no change of circumstances. It is of general importance because the United States is condemning a great deal of land. The owners of the land should not be harassed by successive law suits. *Res judicata* should be applied uniformly, even though it involves condemnation of land by the United States.

Statement.

The appellees herein, H. R. Johnson and John B. Johnson, are the owners of approximately 120 acres in San Bernardino County, California designated in the condemnation proceeding as Parcel M-17.

The Petitioners had been mining said property for many years and at the original trial it was shown that they made a living therefrom for a period of years.

On or about September 1, 1943, the United States, seized the property of the appellees, and destroyed the buildings thereon without any reason.

The United States continued to occupy said land and still occupies it. However, a suit for condemnation of the right to occupy the surface of the land was not filed until June, 1956, being No. 3129 PH. The condemnation action which was for a number of years covered a number of parcels of land in the neighborhood of the Johnson property, the Johnson property being listed as parcel M-17.

The case came on for trial on May 6, 1958, before a jury. As a result thereof, the jury found that the

Johnsons, the petitioners herein, had been damaged to the extent of $18,000.00 by the destruction of the improvements on their property. The jury also found that the reasonable monthly rental to be paid for the use of the surface of said land by the United States was the sum of $225.00. Judgment was entered on said jury verdict under date of July 23, 1958, for $18,000.00 damages and the monthly rental. The amount of the damages were paid, and the rental was paid monthly.

On or about June 30, 1960, the United States filed a second complaint for condemnation of the surface of Petitioners' land, for a period of 5 years, Cause No. 769-60-Y. As a result thereof a Stipulated Judgment was entered into between the United States and the Appellees herein, H. R. Johnson and John B. Johnson. The Stipulation was dated October 5, 1960, and the Judgment was filed on October 6, 1960. Under said Stipulated Judgment, the rental continued at the rate of $225.00 per month or $2,700.00 per year, and such rental was paid through the month of June, 1965.

On or about June 30, 1965, the United States filed a third complaint for condemnation of the surface of Johnsons' land, for a period of 5 years the number of the case being 65-1008-PH Civil.

With the filing of said complaint, the United States filed another document which is headed, "Motion for Order Continuing Possession, Affidavit and Points and Authorities in Support Thereof." Copy of that Motion (with affidavit) is attached as Appendix B.

On July 12, 1965, there was a hearing in the United States District Court at Los Angeles before Honorable Peirson M. Hall, United States District Judge, and an

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Order pursuant to said motion was signed by the Court. A copy of the Order dated July 12, 1965, is Appendix C attached hereto.

It will be noticed that said Order is entitled: "Order Continuing Right to Possession in Condemnation." We call attention also to the following language in said Order, which *was prepared and submitted by the United States Attorney* for action by the Court:

> ". . . and that pursuant to said order entered on September 2, 1943, plaintiff, United States of America, has remained continuously in possession of the land condemned herein from said date of September 2, 1943; from the foregoing the court finds that good cause appears for entry of an order confirming and continuing said possession under the above-captioned action herein."

Notwithstanding said Motion and Order, the United States offered appellees rental of $10.00 per month in place of $225.00, as found by the Jury, by the Judgment of July 23, 1958, and stipulated Judgment of October 5, 1960.

Summary Judgment.

The appellees filed their answer and a motion for Summary Judgment in said case No. 65-1008-PH. Summary Judgment in favor of appellees was entered on February 26, 1968. A Copy thereof is Appendix D attached hereto.

Reversal.

The United States appealed from said Summary Judgment, which was reversed by The United States Court of Appeals for the Ninth Circuit on January 28, 1970, and rehearing denied on March 10, 1970.

REASONS FOR GRANTING THE WRIT.

I.

Subsequent Action Does Not Exclude Application of Res Judicata.

We respectfully urge that the decision of the United States Court of Appeals herein, to the effect that *res judicata* does not apply in this case because the term of the new taking is different from the term of the previous takings, is incorrect. Obviously *res judicata* could only apply if there were a subsequent action involving the identical issues between the same parties over the same subject matter. We submit that the time involved (absent a change of circumstances) does not exclude the application of *res judicata* to the facts and issues determined; because the United States when it filed its Petition and Order in 1965 alleged "continuing Right of Possession." This was nothing more than an extension of a possession already existing (since 1943).

An old case which we submit does directly relate to the issue now before the court for determination, is the case of *Love v. Waltz,* 7 Cal. 250, wherein it was held that judgment for the quarter's rent under a lease is conclusive evidence, so far as it goes, in an action of forcible entry for non-payment of another quarter's rent under the same lease, between the same parties.

It was also held in *Williams v. Hawkings,* 34 Cal. App. 146; 166 Pac. 869, that a judgment in a landlord's prior action against assignees of lease to recover the difference between the rent and the amounts realized by sublettings, concluded assignee as to his responsibility under the lease assignment, the second action being for amounts due covering months of the leased term other than those previously sued for.

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It is obvious that under the circumstances of each of the cases just above referred to if there had been a change of circumstances occurring between the first judgment and the second action in each case, such change of circumstances could have been urged to defeat the application of *res judicata.* In the case at bar if there had been a change of circumstances it could have been urged by either party and, if established, would of course, been material in determining whether *res judicata* applies. *No such change of circumstances was proved.*

II.

Justice v. United States, 9th Circuit (1944), 145 F. 2d 110, Relied Upon by the United States Court of Appeals as Its Authority in Reversing the District Court Is Not in Point With the Facts of This Case.

The *Justice* case did not involve the identical land in the second action as does the case at bar. The premises in the *Justice* case, not being the same, obviously presents a different situation in the second taking, as the court there held. That case proceeds upon the basis that a sum paid by the government for "comparable lands" can only be shown where the sum was fixed out of court.

The decision herein of the Court of Appeals is contrary to the complaint filed by the United States on June 30, 1965. It is contrary to the government's Motion for Order of Continuing Possession dated the same day, which alleges there has been continuous possession since September 2, 1943. (See Appendix B attached hereto.)

The decision of the Court of Appeals herein is contrary to the Findings of Fact and Conclusions as set out in the Order of the United States District Court of July 12, 1965, which Order was prepared by the United States Attorney, and appears as Appendix C attached.

Therefore, the Judgment of the United States District Court dated February 26, 1968, finding that *res judicata* applied and granting Summary Judgment, is correct and should have been sustained on appeal.

III.

The Respondent Herein, the United States, Is Bound by Its Allegations in Its Complaint and in Its Motion for Order of Continuing Possession, Both of Which Were Filed June 30, 1965. It Is Also Bound by the Judgment of the District Court of July 12, 1965, That Possession Is Continuous.

The ten commandments are the basis of all law and morality. One of those ten commandments reads: "Thou shall not bear false witness."

The representatives of the United States have no right to take a different position on Appeal from that which they took in the trial court.

On June 30, 1965, the United States filed its complaint in the case now on appeal. On the same day the United States filed a Notice of Motion and a Motion. The Motion is entitled: "Motion for Order of Continuing Possession." (See Appendix B.)

Nowhere in any pleading filed by the government or in the decision by the United States District Court

on July 12, 1965, was there any allegation or finding that the land had been returned to the owners, or that a new possession was requested.

The decision by the United States Court of Appeals to the effect that the Order Continuing the Possession of the United States in the property involved merely recited existing facts, is contrary to the nature of the order. Since the order itself shows that there was no new taking, the *actual physical possession* already being in the United States, which, absent a change of conditions (which the government utterly failed to allege or prove) would point to the *condition* of that possession rather than the *fact* of that possession. How can the possession be *continued* if it is a *new taking*?

We submit that the prominent issue here is *absent a change of conditions.* The parties; the land, and the issues are the same, so *res judicata* applies.

IV.

The Methods Used by the United States in Connection With Condemnation Matters Has Become High Handed and Oppressive and Should Be Approved Only When the Fairness Thereof Is Adequately Established. This Is Not Such a Case.

The petitioners herein are dirt miners, their income being literally "dug out of the ground." It is most manifest that to subject them every five years to a major trial, making what they may recover minimal after fees and costs of such are deducted, is grossly unfair.

One of the reasons why it is important that certiorari be granted in this case is that the condemnation pro-

cedure has gotten entirely out of hand. This is particularly true in connection with actions by employees of the federal government and is well illustrated by the way the matter was handled against the petitioners herein.

As authority, we call attention to a bill introduced in the Congress (of which this Court will take judicial notice) on October 28, 1969, being numbered S. 1, and is known as the Muskie Bill. The Act may be cited as "Uniform Relocation Assistance and Land Acquisition Policies Act of 1969." This bill has passed in the Senate as amended and is now being considered in the House together with companion bills HR 14898 and 14899.

As further authority for our position that the condemnation procedure is out of hand, we invite attention to the fact that the American Bar Association has a Committee on Condemnation Procedures, to amend the Federal condemnation procedures.

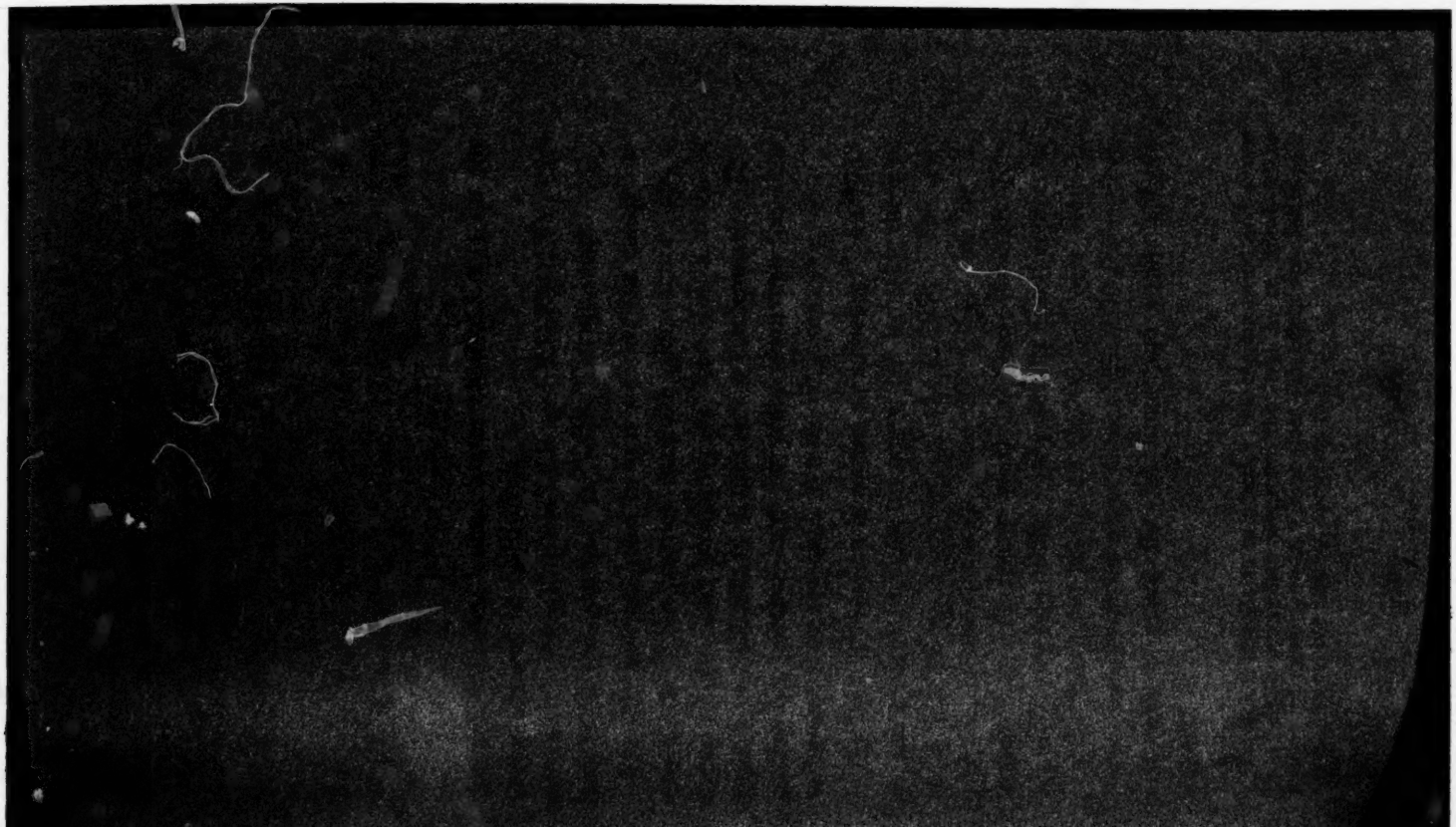
Conclusion.

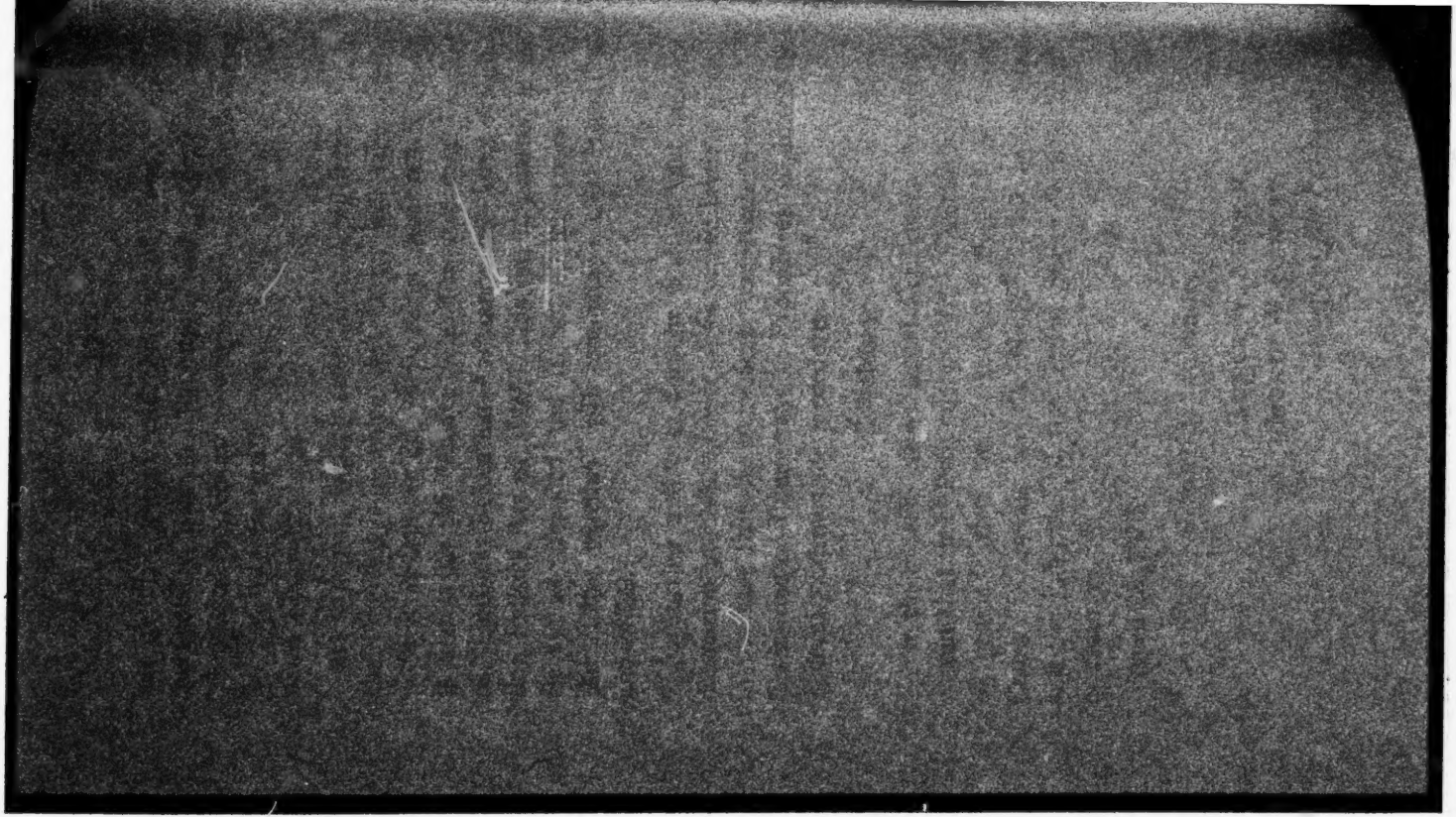
For the reasons above stated Petitioners respectfully submit that their Petition for Writ of Certiorari should be granted; that the decision of the United States Court of Appeals for the Ninth Circuit be reversed and the judgment of the United States District Court be affirmed.

April 20, 1970.

Respectfully submitted,

GEORGE W. NILSSON,
MONTA W. SHIRLEY,
Attorneys for Petitioners.





APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, *Appellant,* vs. H. R. Johnson and John B. Johnson, *Appellees:* No. 22,937.

[January 28, 1970]

Appeal from the United States District Court for the Central District of California.

Before: HAMLEY, CARTER and KILKENNY, Circuit Judges JAMES M. CARTER, Circuit Judge:

The question presented here is whether the compensation fixed in an earlier condemnation action for a taking of use and occupancy of land for a term of years is *res judicata* in a subsequent condemnation proceeding for another term of years involving the same parties and the same land. We hold it is not.

The land in question is owned by appellees. In 1953, the government brought an action condemning the land for a term of years beginning July 1, 1953. The term was to continue through June 30, 1954, and be extendible for subsequent yearly periods through June 30, 1960. In July 1958, a jury verdict fixed compensation for this term taking at $2,700 per year, and the owners were awarded an additional $18,000 for restoration costs covering the buildings and equipment destroyed.[1]

---

[1]There is a dispute as to whether the compensation and award given in this proceeding were for the land in an improved or unimproved state. Since the issue does not affect our decision in this case we do not address ourselves to it.

In 1960 the government brought a second action to condemn the same property for a term running from July 1, 1960 through June 30, 1965. The parties executed a consent judgment fixing the annual rental for the property at $2,700 per year.

On June 30, 1965, the government commenced the present action to condemn the same property for a third term taking from July 1, 1965 until June 30, 1970. Appellees contend that the prior judgment in the first action and the prior stipulated judgment in the second action were controlling as to the rental value of the term under the doctrine of res judicata, and that therefore the government should pay $2,700 per year for the third term taking. Appellees' motion for summary judgment for fair compensation at the rate of $2,700 per year was granted, and the government appealed.

The government contends, and we believe correctly, that the doctrine of *res judicata* is inapplicable in a situation involving successive condemnation proceedings, each taking the property for a term of years. Granted, the doctrine dictates that a valid judgment, rendered on the merits, is an absolute bar to a subsequent action between the same parties or their privies, *upon the same cause of action.* However, the successive proceedings here under consideration were not based on the same cause of action.

The causes of action were different because the term of each taking was for a different period *in time.* A condemnation of land—and the accompanying determination of fair rental value—for a term from July 1, 1953 to July 1, 1960, is not based on the same cause of action as a condemnation of the same land for a term from July 1, 1960 to July 1, 1965. Likewise, a tem-

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porary taking for a term from July 1, 1965 to July 1, 1970, is another cause of action. Although the land and the parties are the same, *the period in time,* involved in the third taking is a different and changed circumstance. See *Justice v. United States* (9 Cir. 1944), 145 F.2d 110, 111.

After filing on June 30, 1965, the present action to condemn the term of years, the government secured an order for possession. Appellees make much of the fact that the order provided "The United States has a right to exercise and continue to exercise its present possession of the property . . .". It was a valid order granting the United States possession of the property. The mere fact that it referred to the previous possession of the government does not invalidate the order of possession. The order merely recited existing facts, namely that the United States had been in possession, and the order continued that possession. The order however, did not have the effect of tying the fair market value of the new term taking to the amount thereto-fixed for either of the previous takings.

> "The power of eminent domain is an inherent attribute of sovereignty, is inexhaustible and may be exercised as often and as many times and at such periods as may be necessary to discharge and perform a Congressional mandate to accomplish the public use authorized and directed." *United States of America v. 70.39 Acres of Land, etc.* (D.C.So. Cal 1958), 164 F.S. 451 at 464 (*Aff. in Carlstrom v. United States* (9 Cir. 1960), 275 F.2d 802).

It is well established that the value of property condemned is to be ascertained as of the date of taking,

United States v. Miller, 317 U.S. 369, 374 (1943). The evidence of a prior award would not be admissible in an action for a subsequent taking. See *Justice v. United States* (9 Cir. 1944), 145 F.2d 110, 111.

The facts of the present case indicate two prior temporary takings, each of which represented a separate and independent act of condemnation, and a separate cause of action. The same is true of the term condemnation here in issue. It is a separate and independent taking and a new cause of action, pursuant to which the value of the property in question, as of the date of taking, must be ascertained. The date of taking was 11:59 PM on June 30, 1965, or more accurately, the beginning of the day of July 1, 1965.

The Judgment is Reversed and the case Remanded.

APPENDIX B.

Motion for Order of Continuing Possession, Affidavit and Points and Authorities in Support Thereof.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff vs. 6305.70 acres of Land in the County of San Bernardino, State of California; Otto A. Seaberg, Dudley Dawn McGill, et al., and "Unknown Owners", Defendants. No. 65-1008-IH Civil.

COMES NOW plaintiff, UNITED STATES OF AMERICA, by its attorneys of record, and moves this court for an order effective July 1, 1965, confirming and continuing in the plaintiff the right of possession of the real property described in Exhibit "A" attached to the Complaint in Condemnation on file herein, which possession was heretofore granted to the United States of America by Order of Immediate Possession entered on September 2, 1943, in Civil Number 3129-PH.

DATED: June 30, 1965.

Manuel L. Real

United States Attorney

Ernestine Tolin

Assistant U. S. Attorney

By Ernestine Tolin

Attorneys for Plaintiff

AFFIDAVIT IN SUPPORT OF MOTION FOR ORDER OF CONTINUING POSSESSION

State of California, County of Los Angeles—ss.

ERNESTINE TOLIN, being first duly sworn, deposes and says that she is an Assistant United States Attorney for the Southern District of California, and that as such attorney she has charge of the records and files in the office of the United States Attorney pertaining to the action herein, and also to Civil Actions Nos. 3129-PH and 769-60-PH, predecessors to the action herein in the matter of the acquisition of the interests and estate described in Exhibit "A" attached to the Complaint in Condemnation herein, and that she is familiar with the proceedings had in connection with each of said actions.

Affiant states that on September 2, 1943, there was entered in Civil Action No. 3129-PH an Order for Immediate Possession of the property therein condemned, and that the perimeter of the taking in said action included the area condemned herein; that pursuant to said order entered on September 2, 1943, the United States has continuously remained in possession of the land condemned herein from said date, September 2, 1943.

Ernestine Tolin

Ernestine Tolin

Subscribed and sworn to before me this 30th day of June, 1965. Margaret M. Collins, Notary Public in and for said County and State. My Commission expires Feb. 25, 1969.

(Seal)

APPENDIX C.

Order Continuing Right to Possession in Condemnation.

United States District Court Southern District of California, Central Division.

United States of America, Plaintiff, v. 6305.70 Acres of Land in the County of San Bernardino, etc., et al., Defendants. No. 65-1008-PH Civil.

Plaintiff's motion for order continuing right to possession of the real property described in Exhibit "A" attached to the Complaint in Condemnation on file herein having come regularly before the court for hearing on the 12th day of July, 1965, plaintiff, United States of America, being represented by Manuel L. Real, United States Attorney, and Ernestine Tolin, Assistant United States Attorney, Southern District of California, the latter being present in court, and the defendants not being represented except as follows:

(In propria persona)

Mr. Otto A. Seaberg and Dodley Dawn McGill. owners of parcel M-41;

Mr. H. R. Johnson and John B. Johnson, owners of Parcel M-17.

It appearing to the court from the affidavit of Ernestine Tolin, one of the attorneys for plaintiff, and from the files and records of this court, that the United States of America has been in continuous possession of the property described in Exhibit "A" of plaintiff's complaint on file herein from September 2, 1943, when this court previously entered in Civil Action No. 3129-PH an Order for Immediate Pos-

session of the property therein condemned, and that the perimeter of the taking in said action included the area condemned herein, and that pursuant to said order entered on September 2, 1943, plaintiff, United States of America, has remained continuously in possession of the land condemned herein from said date of September 2, 1943; from the foregoing the court finds that good cause appears for entry of an order confirming and continuing said possession under the above-captioned action herein.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff, United States of America, has the right to exercise and continue to exercise its present possession of the property described in Exhibit "A" attached to plaintiff's Complaint in Condemnation on file herein, from 11:59 o'clock P.M. on June 30, 1965, to midnight of June 30, 1966, and thereafter during each period of use and occupancy for which plaintiff shall elect to extend said term in accordance with the provisions of the Complaint in Condemnation on file herein, and that all persons having, or claiming to have, any interest in the property described in plaintiff's said Exhibit "A" shall hold and enjoy any such right subject to the right of the United States to exclusive possession thereof as herein provided.

Dated: This 12 day of July, 1965.

Peirson M. Hall
United States District Judge

Presented by: Manuel L. Real, United States Attorney, Ernestine Tolin, Assistant U.S. Attorney By Ernestine Tolin, Attorneys for Plaintiff.

APPENDIX D.

Judgment.

United States District Court Central District of California.

United States of America, Plaintiff, v. 6305.70 Acres of Land in the County of San Bernardino, State of California, etc., et al., Defendants. No. 65-1008-PH Civil.

A Motion for Summary Judgment on behalf of H. R. JOHNSON and JOHN B. JOHNSON filed herein on January 30, 1968, and notice thereof having been regularly given, the matter came before this court on the 19th day of February, 1968. The plaintiff was represented by the United States Attorney, WM. MATTHEW BYRNE, JR., and Assistant United States Attorney, ERNESTINE TOLIN, the latter being present in Court, and the defendants, H. R. JOHNSON and JOHN B. JOHNSON, being represented by their counselors, GEORGE W. NILSSON and MONTA W. SHIRLEY, Mr. Shirley being present in Court. Oral argument by counsel having been presented and the Court having considered the Findings, records and evidence in the case, including two Judgments issued in connection with the condemnation of the same land. One issued on July 23, 1958, in Cause No. 3129-PH-Civil; the other was a Judgment by Stipulation, dated October 6, 1960, in Cause number 76060-Y-Civil, and the Court having issued Findings of Fact and Conclusions of Law herein, finding that the defendants, H. R. JOHNSON and JOHN B. JOHNSON, have a

right to Summary Judgment entered on their behalf as a matter of law, the Court, therefore:

ORDERS, ADJUDGES AND DECREES:

1. That the rental value of the property owned by Messrs. Johnson and Johnson, the surface right of which is now and has been in the possession of the United States, has been determined by the two Judgments of July 23, 1958, and October 6, 1960.

2. That the parties to the action are the same as in the prior actions, so is the land, and there have been no material changes therein, wherefore the question of the rental value of the property is res judicata.

3. That the defendants, Messrs. Johnson and Johnson have been paid the rental up to and including the month of June, 1965, but have received no rental for the period beginning with July, 1965. That, therefore, the United States at the present time owes $2,700 a year from July 1, 1965, up to and including June 30, 1967, or a total of $8,100, together with interest at the legal rate, and thereafter.

4. That the United States may continue in possession of the land under their prior condemnation upon paying to the defendants the rental heretofore fixed of $2,700 per year, payable monthly so long as the Government retains possession of the surface of said lands.

Dated this 26th day of February, 1968.

Peirson M. Hall

United States District Judge